(1) 95-1575

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

$184,505.01 IN U.S. CURRENCY, REGINALD D. MCGLORY,

Claimant-Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MICHAEL YOUNG, ESQ.
(*Counsel of Record*)
165 Christopher Street
New York, New York 10014
(212) 242-4336

Attorney for Petitioner McGlory

56pp

QUESTIONS PRESENTED

1. Whether a writ of certiorari should be granted to resolve the conflict between the circuits over whether forfeitures pursuant to 21 U.S.C. § 881(a)(6) constitute punishment for purposes of double jeopardy and due process analysis.

2. Whether a writ of certiorari should be granted to resolve the conflict between the circuits over whether the fact that all forfeitures pursuant to 21 U.S.C. § 881(a) require proof of different elements from the crimes with which the defendant is charged—such as the fact that the property at issue was related to a criminal sale or exchange—means that such forfeitures are not based on the "same offense" as the criminal charges for purposes of double jeopardy analysis.

3. Whether a writ of certiorari should be issued to determine an important question relating to forfeitures and double jeopardy—whether a defendant is required personally to appear in a forfeiture proceeding which forfeits his property to the government in order for him to claim in a subsequent proceeding that that forfeiture constituted a prior jeopardy.

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Petitioner Reginald McGlory respectfully prays that a writ of certiorari issue to review that portion of a judgment of the United States Court of Appeals for the Third Circuit which affirmed an order of the United States District Court for the Western District of Pennsylvania denying a motion by petitioner McGlory to reopen a default judgment previously entered by that court forfeiting $184,505.01 of Mr. McGlory's property to the government.

OPINIONS BELOW

The decision of the Court of Appeals is officially reported at 72 F3d 1160 (3d Cir. 1995). A copy of the decision is annexed hereto as Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered on December 29, 1995.

The Court's jurisdiction is invoked pursuant to Title 28, United States Code, 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE

The Fifth Amendment of the United States Constitution states in relevant part:

> . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . .

21 U.S.C. § 881(a)(6) states in relevant part:

> The following shall be subject to forfeiture to the United States and no property right shall exist in them:

* * *

(6) All moneys. negotiable Instruments. securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

STATEMENT OF THE CASE

On September 8, 1989, Pittsburgh police and agents of the Drug Enforcement Administration searched three locations—petitioner McGlory's home at 236 South Negley Avenue in Pittsburgh; the home of his wife, Sandra McGlory, at 285 Suncrest Drive in Verona and the home of his mother, Ola McGlory, at 4267 Bryn Mawr Road in Pittsburgh—seizing a large number of items and arresting Mr. McGlory on drug charges (A120)[1].

Mr. McGlory was subsequently indicted on October 4, 1989. *United States* v, *McGlory*, 89 Cr. 144 (W.D.Pa). After the government obtained a superseding indictment naming other co-defendants on December 13, 1989, the trial in the criminal case commenced on April 23, 1990.[2]

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[1] References preceded by "A" are to the appendix filed in the Third Circuit Court of Appeals; references preceded by "BA" are to the documents attached to appellant's brief to the Third Circuit; references preceded by "SSA" are to the documents attached to appellant's reply brief to the Third Circuit.

[2] Petitioner McGlory's subsequent conviction was affirmed by the Third Circuit in *United States* v. *McGlory*, 968 F.2d 309 (3d Cir. 1992).

Meanwhile, the government divided up the property it had seized into 26 separate forfeiture proceedings—*United States* v. *$184,505.01 In U.S. Currency*, 89 Civ. 2323 (W.D.Pa.); *United States* v. *1988 Mazda RX7 Convertible*, 90 Civ.126 (W.D.Pa.); *United States* v. *Nine Framed Paintings*, 90 Civ. 136 (W.D.Pa.); *United States* v. *Nine Framed Paintings*, 90 Civ. 137 (W.D.Pa.); *United States* v. *One Toshiba Color Television, Two Answering Machines and One Health Tech Computer*, 90 Civ.138 (W.D.Pa.); *United States* v. *$14,548.50 In U.S. Currency*, 90 Civ. 236 (W.D.Pa.); *United States* v. *One Marble Indian Statue, et al.*, 90 Civ. 369 (W.D.Pa.); *United States* v. *Assorted Jewelry*, 90 Civ. 370 (W.D.Pa.); see also Drug Enforcement Administration administrative forfeiture proceedings ## 65613, 65615, 66651, 67065, 64582, 65323, 68735, 73402, 65313, 68730, 68719, 68727, 64563, 68740, 68729, 52425, 68743 and 72090.

It then proceeded to commence each of these proceedings on a separate date during the period just before Mr. McGlory's criminal trial.

One of these forfeiture proceedings—*United States* v. *$184,505.01 In U.S. Currency*—is the subject of the present petition. The government commenced *United States* v. *$184,505.01 In U.S. Currency* by filing a complaint for forfeiture on November 21, 1989 (A007, A017). In that complaint, the government acknowledged that the property in question had been seized from petitioner McGlory and that the government was seeking its forfeiture on the basis of Mr. McGlory's alleged drug activities (A017-018).

Mr. McGlory filed a claim of ownership in this proceeding, asserting that the property in question belonged to him. When the government did not receive an answer to the complaint[3],

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[3] The government served the complaint on claimant McGlory via his attorney in the criminal proceedings, Thomas Ceraso, who was at that time overwhelmed with the preparations for the upcoming criminal trial (A040, A051-052). When Ceraso did not respond initially, the government obtained a default judgment on March 26, 1990 (A008 (docket sheet)). Shortly thereafter, on April 24, 1990, Ceraso filed a claim of

however, it moved, and the court granted, an order of forfeiture on April 12, 1991 (A009, A023).

On April 15, 1994, petitioner McGlory filed a *pro se* motion to set aside the default (A049). In that motion, Mr. McGlory explained that he had a meritorious defense to the forfeiture in that he had inherited the money in question from his grandmother (A056-058, A065-066). He also stated that he had only learned of the default recently, and that it had been his understanding that this proceeding had been stayed during the criminal trial and never reactivated (A052, A054, A067-068). He also alleged that his attorney, Ceraso, was supposed to represent him in this forfeiture proceeding (A051), and that simultaneous preparation for both the criminal trial and this civil proceeding would have been impossible (A55). He further alleged that Ceraso had suffered from a conflict of interest in that he had represented one of the principal government witnesses against Mr. McGlory in his criminal trial, and that as a result of this conflict and Ceraso's other omissions, he had failed to provide Mr. McGlory with adequate representation in this forfeiture proceeding (A055, A059, A062, A067-068).

The government opposed Mr. McGlory's motion, claiming *inter alia* that the government had not been required to litigate this action as part of McGlory's criminal case[4]. It also

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ownership on behalf of McGlory and a motion to set aside the default (A008, A051-052).

After that motion was granted, the government sought and obtained several extensions of time to complete discovery and take claimant McGlory's deposition (A008 (docket sheet)). Then, on January 31, 1992, without doing anything further concerning either discovery or deposition, the government filed a motion seeking an order compelling claimant McGlory to answer the complaint, which the district court issued on February 11, 1991 (A009). When Mr. McGlory's attorney failed to file an answer, the government sought and obtained its default judgment.

[4] See the United States' Response in opposition to Claimant's Motion to Set Aside Entry of Default Judgment in 89 Civ. 2323 at paragraph 8. This document is included in the record on appeal in 94-3528.

alleged *inter alia* that Rule 60(b) of the Federal Rules of Civil procedure (under which McGlory had brought his motion to set aside the default judgment) did not apply to *in rem* forfeiture proceedings (A080) and that McGlory would not be able to prove his allegations of a meritorious defense at a trial (A084-085). On August 10, 1994, the district court entered an order denying petitioner McGlory's motion "for the reasons articulated in the United States' Brief in Opposition" (BA10).

Petitioner McGlory's appeal to the United States Court of Appeals for the Third Circuit in this matter was consolidated with his appeals in two other civil forfeiture matters—*United States* v. *$14,548.50 In U.S. Currency*, 90 Civ. 236 and *United States* v. *One Marble Indian Statue, et al.*, 90 Civ. 369.

On December 29, 1995, the Third Circuit rendered a decision reversing the district court's orders in the other two cases on the ground that Mr. McGlory's constitutional right to due process had been violated by the government's failure to serve him with proper notice of those proceedings. *United States* v. *$184,505.01 in U.S. Currency*, 72 F.3d 1160, 1163-65 (3d Cir. 1995)[5].

The Third Circuit, however, affirmed the district court's order denying petitioner McGlory's motion to reopen the default judgement in *United States* v. *$184,505.01 in U.S. Currency*. Despite the fact that the judgment in this matter was entered after the entry not only of the judgment in Mr. McGlory's criminal case but also of the forfeitures in all of other forfeiture proceedings which the government had brought against Mr. McGlory's property, the Third Circuit nevertheless held that it did not violate his Fifth Amendment rights. *United States* v. *$184,505.01 in U.S. Currency*, supra, 72 F.3d at 1165 et seq.

The panel based its ruling primarily on its belief that forfeitures under 21 U.S.C. § 811(a)(6) do not constitute a separate "punishment" within the meaning of the Double

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5 The Third Circuit's decision is attached hereto as Appendix A.

Jeopardy Clause. Id. at 1165-70. In so holding, the panel conceded that it was placing itself in direct conflict with the position taken by the United States Court of Appeals for the Ninth Circuit that such forfeitures do constitute a separate punishment:

> In so holding, we reject the contrary reasoning and conclusion of the Ninth Circuit regarding § 881(a)(6) in *United States* v. *$405,089.23 U.S. Currency*, 33 F.3d 1210 (9th Cir. 1994), amended on denial of rehearing, 56 F.3d 41 (9th Cir. 1995), [cert. granted, ___ U.S. ___, 116 S.Ct. 762 (January 12, 1996).]

United States v. *$184,505.01 in U.S. Currency*, supra, 72 F.3d at 1169.

The panel also held that although the forfeitures were all based on Mr. McGlory's alleged (and unspecified) drug activities, they nevertheless were not predicated on the "same offense" as required for double jeopardy analysis under the *Blockberger/Dixon* test, since, according to the panel, each forfeiture involved a different element—to wit, a different piece of property. It also maintained that the forfeitures were not the same offense as the criminal charges, since each required proof of different elements. Id. at 1169-70. In so holding, the panel implicitly conceded that it was placing itself in conflict with the position taken by both the Ninth Circuit and the Sixth Circuit in *United States* v. *$405,089.23 U.S. Currency*, *supra*, and *United States* v. *Ursery*, 59 F.3d 568 (6th Cir. 1995), cert. granted, ___ U.S. ___, 116 S.Ct. 762 (January 12, 1996), respectively.

Finally, the panel held that even if Mr. McGlory had been punished by the earlier forfeitures, he could not claim to have been put in jeopardy by those proceedings since he had not appeared in them. *United States* v. *$184,505.01 in U.S. Currency*, *supra*, 72 F.3d at 1167-68.

REASONS FOR GRANTING THE WRIT

POINT I

A. WRIT OF CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT BETWEEN THE CIRCUITS OVER WHETHER FORFEITURES PURSUANT TO 21 U.S.C. § 881(a)(6) CONSTITUTE PUNISHMENT FOR PURPOSES OF DOUBLE JEOPARDY AND DUE PROCESS ANALYSIS.

The United States Attorney for the Western District of Pennsylvania, in addition to bringing criminal charges against petitioner McGlory, also instituted no less than twenty-six separate forfeiture proceedings against different items of Mr. McGlory's property. The property at issue in this proceeding was the last of those forfeitures to be finalized, after all of the other twenty-five forfeitures had been completed and the judgment in the criminal case had been entered.

Petitioner McGlory respectfully submits that these facts alone make this case the very epitome of the multiple jeopardy which the Fifth Amendment was designed to prevent. The Third Circuit, however, held that these circumstances did not constitute multiple jeopardy at all. In order to reach that conclusion, the Circuit took the position that forfeitures of an individual's property under 21 U.S.C. § 881(a)(6) can never constitute punishment within the meaning of the Double Jeopardy Clause. *United States* v. *$184,505.01 in U.S. Currency*, *supra*, 72 F.3d at 1168-69.

In so ruling, the Third Circuit acknowledged that it was placing itself in direct conflict with the position which the Ninth Circuit has taken on this issue in cases such as *United States* v. *$405,089.23 U.S. Currency*, 33 F.3d 1210 (9th Cir. 1994), amended on denial of rehearing, 56 F.3d 41 (9th Cir. 1995), cert. granted, ___ U.S. ___, 116 S.Ct. 762 (January 12, 1996). *United States* v. *$184,505.01 In U. S. Currency*, *supra*, at 1169.

The Third Circuit's holding on this issue is also in direct conflict with the position taken by the Tenth and Seventh Circuits in *United States* v. *Titan Court, Unit 9, Littleton, Colo. (May)*, Nos. 94-1285 etc., (10th Cir. February 5, 1996), 58 CrL 1449 (February 21, 1996), and *United States* v. *Torres*, 28 F.3d 1463, 1465 (7th Cir. 1994) respectively. On the other hand, it is consistent with the Fifth Circuit's decision in *United States* v. *Tilley*, 18 F.3d 295 (5th Cir. 1994).

Thus, at present, there appear to be at least three Circuits holding that forfeitures under 21 U.S.C. § 881(a)(6) are punishment, and at least two other Circuits holding that they are not. This is therefore a clear conflict between the Circuits which needs to be resolved by the Court.

The Court has already granted certiorari in the Ninth Circuit case. *United States* v. *$405,089.23 U.S. Currency*, 33 F.3d 1210 (9th Cir. 1994), amended on denial of rehearing, 56 F.3d 41 (9th Cir. 1995), cert. granted, ___ U.S. ___, 116 S.Ct. 762 (January 12, 1996). Petitioner McGlory's case, however, has additional considerations, such as the fact that the government brought twenty-six separate forfeiture proceedings in addition to the criminal proceedings, which make it a more compelling violation of the prohibition against double jeopardy than the circumstances in the Ninth Circuit case. Moreover, the Court may not reach the question of whether forfeitures under § 881(a)(6) constitute punishment for purposes of double jeopardy analysis in the Ninth Circuit case. This case also raises a Due Process claim which is not presented in the Ninth Circuit case. (see infra at p. 15). Consequently, petitioner McGlory respectfully urges the Court to grant a writ of certiorari in this case to assure resolution of the conflict between the Circuits on this important issue.

The Third Circuit's position on this issue is clearly incorrect—the forfeiture of the property at issue here did constitute a multiple punishment vis-a-vis the previous judgment in the criminal case and the other previous forfeitures. The government concedes that all of the forfeited items at issue in all of the twenty-six forfeitures were seized from the same per-

son—petitioner McGlory—on the same day—September 8, 1989. Moreover, the government claimed to have the right to forfeit all of these items to itself based on the same allegation—that petitioner McGlory had been involved in the same illegal drug activity. Nevertheless, instead of seeking forfeiture of these items as part of the criminal proceedings which the government had initiated against petitioner McGlory, the government instead saw fit to divide these items up into twenty-six separate forfeiture proceedings. It then compounded that impropriety by initiating each of these forfeiture proceedings on a separate day during the period immediately preceding the commencement of the trial in petitioner's criminal case. The result was obvious—even if petitioner and his attorney had been properly served with notice (which they were not as to many of the forfeitures, see eg. *United States* v. *$184,505.01 In U. S. Currency*, *supra*, at 1163-64), they could not possibly have managed this barrage of litigation at the same time that they were preparing for a lengthy multi-defendant criminal trial. This is quite possibly the very reason why the government proceeded in this fashion.

Petitioner McGlory maintains that these forfeiture proceedings should have been part of his criminal proceeding (A35-36, A39-40, A48, A122), and that the government improperly used these forfeiture proceedings to impose additional "punishment" on him (A147). The government insists, however, that "the United States was not required to litigate the forfeiture matters during the criminal trial" and that "the criminal trial of the [sic] McGlory and the forfeiture proceedings are two different matters"(A152)[6].

In fact, the government is wrong. According to this Court, forfeitures which are not merely remedial but which also serve, at least in part, a "retributive or deterrent" purpose, are punishment for purposes of constitutional analyses. *United*

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[6] See also the United States' Response in opposition to Claimant's Motion to Set Aside Entry of Default Judgment in 89 Civ. 2323 at paragraph 8. This document is included in the record on appeal in 94-3528.

States v. *Halper*, 490 U.S. 435, 448 (1989); *Austin* v. *United States*, ___ U.S. ___, 113 S.Ct. 2801, 2806 (1993). More specifically, the Court has held that forfeitures which are sought on the basis of alleged criminal activity, and in particular, forfeitures which are sought under 21 U.S.C. § 881(a), are at least partly retributive or deterrent. *Austin* v. *United States*, *supra*, at 2810, 2814. Consequently, if the government secures such forfeitures in separate proceedings rather than as part of the underlying criminal proceeding, they constitute additional punishments for the same crime in violation of the Constitution's double jeopardy proscription. See *Department of Revenue of Montana* v. *Kurth Ranch*, ___ U.S. ___, 114 S.Ct. 1937 (1994); *Austin* v. *United States*, ___ U.S. ___, *supra*, 113 S.Ct. at 2812; *United States* v. *Halper*, *supra*, 490 U.S. at 448.

Under the Court's decisions in *Halper*, *Austin* and *Kurth Ranch*, there can be no serious doubt that the forfeitures at issue here are subject to double jeopardy restrictions. Indeed, it is difficult to imagine a clearer example of what the double jeopardy clause was designed to prevent.

In this trilogy of cases, the Court formulated the rules to be applied by the lower courts in determining when "civil" procedures are to be considered punitive for purposes of constitutional protections. According to the Court, the rule to be applied depends largely on the nature of the statute being addressed. In *Halper*, the Court held that where the statute in question is a "fixed-penalty provision," the courts should employ a case-by-case analysis to determine whether the application of that fixed-penalty to a particular defendant results in a payment which is so disproportionate to the government's expenses in the case that the sanction constitutes a punishment (*Id.* at 1902).

In *Austin*, on the other hand, the Court held that where the case involves a forfeiture statute—specifically, the same 21 U.S.C. § 881(a) which is at issue here—the court should focus instead on the forfeiture statute "as a whole." (*Id.* at 2812 fn. 14).

The Court justified this different rule for forfeiture statutes because (1) forfeitures have historically been regarded as at least partly punitive and (2) they are by their nature not fixed, but rather vary dramatically from case to case. *Id.* at 2812 fn. 14; See also *United States* v. *$405,089.23 U.S. Currency*, *supra*, 33 F.3d at 1220; David B. Smith, *Prosecution and Defense of Forfeiture Cases*, ¶ 12.10 at 12-131 (1993)[7].

A short time later, in *Kurth Ranch*, the Court reaffirmed and extended this "statute as a whole" analysis by applying it to a tax provision in *Kurth Ranch*.

As the Court explained in these cases, fixed penalty provisions are almost always remedial; the occasions on which they will be so disproportionate as to take on the characteristics of a punishment will be "rare." *United States* v. *Halper*, *supra*, 490 U.S. at 449. Forfeitures, on the other hand, particularly in light of their traditional role as punishment, will almost always be at least partly punitive. *United States* v. *Austin*, *supra*, 113 S.Ct. at 2806-2810, 2812 fn.14; see also Smith, *Prosecution and Defense of Forfeiture Cases*, *supra*, ¶ 12.10 at 12-126-127.

Instead of following the Court's holding in *Austin*, the Third Circuit (like the Fifth Circuit in *Tilley*) incorrectly applied *Halper*'s analysis for fixed-penalty provisions to this case. What the Third Circuit overlooked in doing so is what the Court made clear in *Austin*—that 18 U.S.C. § 881(a) is not a fixed-penalty provision, but rather a variable forfeiture provision. As such it is clearly governed by the "statute as a whole" analysis which the Court applied to it in the *Austin* decision.

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[7] As Smith explains in *Prosecution and Defense of Forfeiture Cases*, *supra*, ¶ 12.10, "[w]hereas the *Halper* Court focused on whether the sanction, *as applied in the individual case*, serves the goals of punishment, the *Austin* Court thought that in the forfeiture context it made sense to focus on the forfeiture statute as a whole" (emphasis in the original).

Although *Austin* involved subsections (4) and (7) of 21 U.S.C. § 881(a), whereas this case involves subsection (6) of that statute, all three of the "statute as a whole" considerations which the Court found to establish that the forfeiture was punitive in *Austin* are equally applicable here. The first factor on which the Court relied was the fact that "forfeiture generally and statutory *in rem* forfeiture in particular historically have been understood, at least in part, as punishment." (*Id.*, 113 S.Ct. at 2810). This traditional role of forfeitures as punishment is just as applicable to forfeitures under subsection (6) as it is to forfeitures under subsections (4) and (7).

The second factor cited by the *Austin* Court was that subsections (4) and (7) focus on "the culpability of the owner" as evidenced *inter alia* by the fact that they expressly provide an " 'innocent owner defense" (*Id.*, 113 S.Ct. at 2810-2811). Subsection (6) likewise focuses on the culpability of the owner and contains an innocent owner defense.

The third factor which the Court held to be relevant in *Austin* was the fact that "Congress has chosen to tie forfeitures directly to the commission of drug offenses" (*Id.* at 2811). This, according to the Court, established that Congress understood the forfeiture provisions as "serving to deter and punish" (*Id.*, 113 S.Ct. at 2811, 2812). Again, this connection between forfeitures and the commission of drug offenses is equally as true of forfeitures under subsection (6) as it is of forfeitures under subsections (4) and (7).

Consequently, applying the analysis established by the Court in *Austin*, forfeitures under subsection (6), like forfeitures under subsections (4) and (7), are clearly at least partly punitive and therefore subject to double jeopardy restraints. Indeed, it was the existence of these common characteristics shared by the various subsections of § 881(a) which led Justice Scalia in his concurrence in *Austin* to indicate that all forfeitures under § 881(a) are at least partly punitive:

> Statutory forfeitures under § 881(a) are certainly *payment* (in kind) *to a sovereign* as *punishment* for an *offense*.

Id., 113 S.Ct. at 2814; Justice Scalia, concurring (emphasis in the original)

These shared characteristics also led the Ninth and Tenth Circuits specifically to conclude that the double jeopardy clause is applicable to forfeitures under subsection (6). See eg. *United States* v. *$405,089.23 In U.S. Currency*, *supra*, 33 F.3d at 1221; *United States* v. *Titan Court, Unit 9, Littleton, Colo. (May)*, *supra*. Petitioner respectfully submits that the position of those Circuits on this issue is clearly correct and should be followed by this Court.

Perhaps because it was decided before *Kurth Ranch* and *$405,089.23 In U.S. Currency*, the *Tilley* case on which the Third Circuit relies so heavily for this issue, makes the fundamental error of assuming that *Austin* is not applicable to subsection (6) forfeitures. In order to reach this conclusion, it erroneously reverts to a *Halper*-type proportionality analysis. Thus, it insists that forfeiture of drug proceeds is solely remedial because it will always be "roughly proportional to the harm inflicted upon government and society by the drug sale" (*Id.*, 18 F.3d at 300).

That is not what remedial means, however, at least not in the context of double jeopardy analysis. Virtually every time that a judge imposes a punishment for criminal activity, he seeks a penalty which is "roughly proportional to the harm inflicted upon government and society" by the crime involved. That is the very essence of retribution.

In that sense, every punishment is remedial. But clearly, that sort of remediation does not serve to exempt all punishments from double jeopardy considerations. If it did, it would altogether eviscerate the Constitution's double jeopardy protection. Rather, in the double jeopardy context, the Court, first in *Austin* and later in *Kurth Ranch*, expressly limited the term "remedial" to situations where the statute was specifi-

cally designed for the sole purpose of reimbursing the "government's actual costs." *Austin* v. *United States*, *supra*, 113 S.Ct. at 2812 fn.14; see also *Kurth Ranch*, *supra*, 114 S.Ct. at 1944-1945.

Moreover, in *Austin*, the Court noted that unlike fixed penalty provisions, any relationship between the forfeiture of instrumentalities and the Government's actual costs in any given case would be, at most, "coincidental" (*United States* v. *Austin*, *supra*, 113 S.Ct. at 2812 fn.14). The same is true of the forfeiture of proceeds. Although one could reason that the amount of proceeds which might be seized in any given case would occasionally (but by no means always) happen to be roughly proportional to the government's actual costs, the same could also be assumed with regard to instrumentalities—the value of the instrumentalities seized would sometimes (but not always) be roughly proportional to the government's actual costs. Given their clearly punitive role, however, the speculative possibility of such occasional "rough proportionality" was not enough to take the forfeitures in *Austin* out of the realm of punishment. It is likewise not sufficient to take the forfeitures here out of that category.

Likewise, with regard to both instrumentalities and proceeds, the property actually available to be seized in any given case would vary widely depending on such idiosyncrasies as the book-keeping methods, spending habits and even the individual tastes of the individuals involved. It would even vary widely depending on the date that any seizure took place and what monies and/or instrumentalities happened to be on hand at that time. It is therefore clear that the "dramatic" variation which the Supreme Court found with regard to instrumentalities in *Austin* is equally true of the alleged proceeds at issue here.

Just from a common sense standpoint, the government cannot credibly claim that its taking of virtually all of petitioner McGlory's property—his clothing, statues, jewelry, appliances and money—was not done at least in part as punishment, retribution or deterrence. If the government had

pursued these punitive goals in a single proceeding, it might not have run afoul of constitutional protections. By choosing instead to proceed in the fragmented fashion that it did in these cases, however, the government clearly violated the constitutional prohibition against subjecting an individual to multiple jeopardies for the same offense.

In addition to violating the Double Jeopardy Clause, the successive proceedings at issue here were also unconstitutional for another reason—because they violated Due Process protections:

> successive trials arising from . . . the same criminal transaction may violate an accused's right to due process in the form of his right to be free of prosecutorial attempts to wear out the accused by a multitude of cases with accumulated trials.

United States v. *One 1978 Piper Cherokee Aircraft*, 37 F.3d 489, 495 fn. 10 (9th Cir. 1994), quoting from *Tucker* v. *Makowski*, 883 F.2d 877, 880-881 (10th Cir. 1989) See also *Sanchez* v. *United States*, 341 F.2d 225, 229 (9th Cir. 1965) ("planned exposure of an accused to a succession of trials for offenses clearly subject to joinder . . . may well constitute fundamental unfairness.").

Where the government has improperly exacted multiple punishments for the same offense, only the first judgment is permitted to stand. *Department of Revenue* v. *Kurth Ranch*, *supra*, 114 S.Ct. at 1946-1947. Since the government here obtained the forfeitures in the other twenty-five proceedings and the judgment in the criminal proceeding before obtaining the forfeiture in this proceeding, this last judgment clearly constitutes a multiple jeopardy.

The government could have brought this forfeiture proceeding as part of its criminal case. It chose not to do so. It is difficult to see what purpose—other than harassment of the defendant—was served by fragmenting the items seized into the multiple proceedings at issue here. Whatever the government's motives, however, that fragmentation clearly vio-

lated petitioner McGlory's double jeopardy protections under the federal constitution. Consequently, the judgment in *United States* v. *$184,505.01 In U.S. Currency* should be set aside.

POINT II

A WRIT OF CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT BETWEEN THE CIRCUITS OVER WHETHER THE FACT THAT ALL FORFEITURES PURSUANT TO 21 U.S.C. § 881(a) REQUIRE PROOF OF DIFFERENT ELEMENTS FROM THE CRIMES WITH WHICH THE DEFENDANT IS CHARGED—SUCH AS THE FACT THAT THE PROPERTY AT ISSUE WAS RELATED TO A CRIMINAL SALE OR EXCHANGE—MEANS THAT SUCH FORFEITURES ARE NOT BASED ON THE "SAME OFFENSE" AS THE CRIMINAL CHARGES FOR PURPOSES OF DOUBLE JEOPARDY ANALYSIS.

Two members of the Third Circuit panel also held that the circumstances here did not constitute multiple jeopardy for a second reason—because they believed that the forfeiture somehow was not predicated on the same offense as any of the earlier forfeitures or the criminal conviction. *United States* v. *$184,505.01 in U.S. Currency*, *supra*, 72 F.3d at 1169. Consequently, those two judges reasoned, it did not satisfy the "same elements" test established by this Court in *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932) and *United States* v. *Dixon*, ___ U.S. ___, 113 S.Ct. 2849 (1993). Chief Judge Sloviter declined to join in this section of the opinion. *United States* v. *$184,505.01 in U.S. Currency*, *supra*, 72 F.3d at 1171 fn. 19.

This argument was never even raised by the government, presumably because it did not feel that the argument had any merit.

By imposing this interpretation upon the "same elements" test, these two judges placed the Third Circuit in direct con-

flict with the position which has been taken by the Seventh, Ninth and Tenth Circuits in *United States* v. *Torres*, *supra*, *United States* v. *$405,089.23 U.S. Currency*, *supra*, and *United States* v. *Titan Court, Unit 9, Littleton, Colo. (May)*, *supra*, respectively. In fact, even the Fifth Circuit's decision in *Tilley* on which the rest of the Third Circuit's decision in this case relies so heavily did not go this far. The holding of the two judges on this matter is apparently unsupported by any other Circuit.

The holding of these two judges on this issue is clearly incorrect. All of the judicial forfeiture complaints involving Mr. McGlory's property were identically worded. All specifically stated that the forfeiture were based, like the criminal proceedings, on petitioner McGlory's alleged drug activities (A012, A015, A018).

As such, these forfeiture proceedings clearly satisfied the "same elements" test which this Court has applied double jeopardy cases. *United States* v. *Dixon*, *supra*; *Blockburger* v. *United States*, *supra*.

As the Tenth Circuit explained in rejecting the Third Circuit's misinterpretation of the "same offense" rule when it was raised by the government in *United States* v. *Titan Court, Unit 9, Littleton, Colo. (May)*, *supra*, that misinterpretation is based on the premise that the forfeiture statute, 21 U.S.C. § 881(a)(6) defines a separate offense. In fact, however, it clearly does not; rather, it defines a punishment.

Even if it did define a separate offense, however, the government clearly violates Double Jeopardy protections by pursuing it as here in a separate proceeding. If a separate offense is created, then it is one which consists of two elements—the underlying drug offense and the relationship of the property in question to that offense. As such, the drug offense would be a lesser included offense of the forfeiture "offense" and therefore could not properly be prosecuted and punished in a separate proceeding. See eg. *Harris* v. *Oklahoma*, 433 U.S. 682, 682 (1977).

More fundamentally, however, the opinion of the two Third Circuit judges on this matter clearly applies the same offense test "at too abstract a level." *United States* v. *Titan Court, Unit 9, Littleton, Colo. (May), supra*. Where, as in the case of § 881(a)(6) forfeitures, the commission of one of a certain class of drug offenses is a necessary element of the forfeiture "offense", and where the same conduct or unit of prosecution is the factual basis of both, each offense within that class of drug offenses is a "species of lesser-included offense" in relation to the forfeiture "offense". *United States* v. *Titan Court, Unit 9, Littleton, Colo. (May), supra*; see also *Illinois* v. *Vitale*, 447 U.S. 410, 420 (1980). Here, clearly, the drug offenses of which Mr. McGlory had previously been convicted, and on which the previous forfeitures were all based, constituted a "species of lesser-included offense" vis-a-vis the forfeiture "offense" involving the $184,505.01. Separate prosecution of the forfeiture "offense" was therefore clearly barred under the Double Jeopardy clause. *United States* v. *Titan Court, Unit 9, Littleton, Colo. (May), supra*.

The holding of the two Third Circuit judges regarding the "same offense" rule is clearly a misinterpretation of that rule, which conflicts with the holding of every other Circuit which has addressed this issue. Petitioner McGlory therefore respectfully asks the Court to grant certiorari so as to correct this misinterpretation and resolve this conflict between the Circuits.

POINT III

A WRIT OF CERTIORARI SHOULD BE ISSUED TO DETERMINE AN IMPORTANT QUESTION RELATING TO FORFEITURES AND DOUBLE JEOPARDY—WHETHER A DEFENDANT IS REQUIRED PERSONALLY TO APPEAR IN A FORFEITURE PROCEEDING WHICH FORFEITS HIS PROPERTY TO THE GOVERNMENT IN ORDER FOR HIM TO CLAIM IN A SUBSEQUENT PROCEEDING THAT THAT FORFEITURE CONSTITUTED A PRIOR JEOPARDY.

The Third Circuit's decision in this case also raises another issue which is both important and recurrent in forfeiture litigation, and therefore appropriate for this Court to address—whether an individual whose property is being forfeited to the government must actually participate in those proceedings in order to claim that they constituted a jeopardy as to him for purposes of double jeopardy analysis.

The Third Circuit's holding that he must do so is actually *dicta* in the circumstances of this case. Mr. McGlory was clearly placed in jeopardy by his criminal proceedings. Moreover, the government concedes that Mr. McGlory did file a claim in the subsequent $184,505.01 forfeiture proceeding which is at issue here. Consequently, whether any of the other prior forfeitures in which he did not participate also constituted a prior jeopardy is really irrelevant—the criminal conviction alone clearly satisfied that requirement.

Petitioner McGlory respectfully submits, however, that the Third Circuit is clearly wrong in holding that an individual does not suffer jeopardy when his property is forfeited to the government unless he enters an appearance in the forfeiture proceeding. If the property is his, and taken for that reason, then regardless of whether he appeared in that forfeiture action he has clearly been punished—and punishment is one of the fundamental forms of jeopardy recognized by this Court.

The Third Circuit's position on this issue is incorrect, first of all, because here as in most forfeiture proceedings under § 881(a), the government has conceded that petitioner McGlory is the owner of the forfeited property in its own prior pleadings. As previously explained, the government stated in the complaints that initiated these forfeiture proceedings that the property in question had been seized from petitioner McGlory. It further stated that it was seeking forfeiture of this property on the basis of petitioner McGlory's alleged illegal activities. Furthermore, it expressly identified McGlory as the "owner" of the property in some of the administrative forfeiture notices which it prepared pertaining to this property (See eg. SSA 15). It also took the position at petitioner McGlory's criminal trial that the seized property belonged to petitioner McGlory and constituted evidence of his alleged drug activities (see eg. SSA 17-18).

Consequently, it cannot now reasonably claim that merely because petitioner did not file a claim in the forfeiture proceedings asserting that ownership, he is barred from maintaining that the government's forfeiture of this property constituted a jeopardy for purposes of the double jeopardy clause. Such an about-face is clearly prohibited by the doctrine of judicial estoppel. As this and the Circuit courts have recognized:

> . . . the well-established doctrine, sometimes referred to as "judicial estoppel" . . . precludes a litigant from leading a court to find one way in one proceeding and then, because his interests have changed, leading the court to find another way in a subsequent proceeding.

Sperling v. *United States*, 692 F.2d 223, 228-229 (2d Cir. 1982) (concurring opinion[8]) See also *Teledyne Industries Inc.* v. *N.L.R.B.*, 911 F.2d 1214, 1218 (6th Cir. 1990); *Allen* v. *Zurich Ins. Co.*, 667 F.2d 1162, 1165-1167 (4th Cir. 1982); *Scararo* v.

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[8] Although the quoted passage is from the concurring opinion in *Sperling*, it was expressly adopted by, and made part of, the court's opinion (*Id.*, 692 F.2d at 224 fn*).

Central R.R., 203 F.2d 510, 513 (3d Cir. 1953). The government simply cannot claim in both the initial forfeiture proceedings and the criminal trial that this property belonged to petitioner McGlory and then turn around and insist now that it did not.

These circumstances also place this case in stark contrast to *United States* v. *Torres*, 28 F.3d 1463 (7th Cir. 1994), the case on which the Third Circuit relies. In that case, the property at issue was money which Torres and one Olivares had produced to pay for drugs. There was no evidence that the money belonged to Torres as opposed to Olivares or even some third party on whose behalf they were making the purchase. Moreover, unlike in this case, the government never claimed that the money belonged to Torres or that he had earned it through his drug activities. Given these circumstances, the Seventh Circuit found that in the absence of any claim of ownership by Torres

> we have no reason to believe that he owned or had any interest in the money . . . Perhaps he was just a courier, making the buy on behalf of an undisclosed principal. If Torres lacked an interest in the cash, its forfeiture did not impose any penalty on him . . . (*Id.*, 28 F.3d at 1465).

Here, to the contrary, the position which the government took in the original forfeiture proceedings and in the criminal trial has left no doubt that as far as the government was concerned, petitioner McGlory was the owner of this property.

The Third Circuit's position—that petitioner McGlory was required expressly to assert ownership of the property in question in the civil proceedings in order to be entitled to claim that this forfeiture constituted a jeopardy—also runs contrary to the Fifth Amendment's protection against self-incrimination. By rushing these separate forfeiture proceedings forward prior to petitioner's criminal trial, the government clearly sought to put petitioner McGlory in an impossible position—either personally enter a claim of own-

ership of the property and thereby provide the government with an admission which it could then use against him in his criminal trial, or else supposedly lose not only the property but also the double jeopardy protection to which the government's taking of that property entitled him. In effect, the government is insisting that petitioner McGlory is not entitled to both the Fifth Amendment right against self-incrimination and the Fifth Amendment right against double jeopardy. To the contrary, he clearly is—it is well established that a defendant cannot be forced to make such an intolerable choice between two important constitutional rights. See eg. *Simmons* v. *United States*, 390 U.S. 377 (1968).

In addition, the Third Circuit's position on this matter is inconsistent with the Court's holding in *United States* v. *Austin*, *supra*, 113 S.Ct. at 2810, that "statutory *in rem* forfeiture in particular historically ha[s] been understood, at least in part, as punishment." Since the Court obviously was not talking about punishment of the named defendant (which in *in rem* proceedings is the property itself) it was clearly referring to punishment of the individual whose conduct was cited as the basis for the forfeiture—in this case petitioner McGlory. The punitive nature of *in rem* forfeitures thus is inherent in the proceeding itself and is not dependent, as the Third Circuit seems to believe, on whether the individual being punished happened to file a claim.

It is therefore clear that for double jeopardy purposes the issue here is not whether petitioner went through the formality of filing a claim in the civil proceedings, but whether the government maintained that the property was his and then proceeded to take over its ownership on that basis. Since it did, the government is judicially estopped from claiming that this property did not belong to petitioner McGlory, or that its taking of that property from him did not constitute a "jeopardy" for purposes of double jeopardy analysis.

This is particularly so since it was the government, by electing to bring the twenty-six separate forfeiture proceedings that it did in this case, which virtually assured that peti-

tioner McGlory would not be able effectively to defend in all of these proceedings, especially at the same time as he was preparing for a twenty-seventh proceeding—his criminal trial. The government also insured that result by failing to provide petitioner McGlory with adequate notice of the judicial proceedings so that he could enter his appearance in them. That being the case, the government should not be permitted to benefit from its own improprieties by now claiming that because petitioner did not enter those proceedings, he derives no double jeopardy protection from the government's taking of his property.

The Court should be aware that The Third Circuit itself is divided on this matter. Thus, in *United States* v. *Baird*, 63 F.3d 1213 (3d Cir. 1995), Judge Sarokin, dissenting, took the position that it was not necessary for a defendant whose property was forfeited to the government to actually participate in the forfeiture proceeding in order to claim that it constituted a prior jeopardy.

Since this issue is clearly of vital importance to many proceedings involving forfeitures, petitioner McGlory respectfully submits that it constitutes yet another reason why a writ of certiorari should be granted by the Court to review the proceedings in this case.

CONCLUSION

For the reasons set forth above, a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL YOUNG, ESQ.
Attorney for Defendant McGlory
165 Christopher Street
New York, New York 10014
(212) 242-4336